MOTION FILED

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No. 99-1081

IN THE

Supreme Court of the United States

TOWN OF MULDROW, *et al.*,

Petitioners,

v.

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF *AMICUS CURIAE* THE WATER WORKS AND SEWER BOARD OF THE CITY OF BIRMINGHAM FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

MARY H. THOMPSON
Counsel of Record
K. MARK PARNELL
GORHAM & WALDREP, P.C.
Attorneys for Amicus Curiae
2101 6th Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

157555

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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The Water Works and Sewer Board of the City of Birmingham (herein referred to as the "Board"), hereby moves, pursuant to Rule 37.2(b) for leave to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The Petitioners, Town of Muldrow and the Muldrow Public Works Authority, have consented to the filing of this brief, but the Respondent, Sequoyah County Rural Water District No. 7, has withheld its consent for filing of *amicus curiae* briefs. A copy of the proposed *amicus* brief is attached.

The Board is an Alabama public corporation organized under Alabama law for the purpose of supplying water and sewer services to the Birmingham metropolitan area. As such, the Board operates, on behalf of the City of Birmingham (herein referred to as the "City"), a water system which service area includes not only areas within the City limits, but also has expanded over the years to serve outlying rural areas. The Board, on behalf of the City, has invested substantial amounts in its infrastructure to supply water to its customers in these outlying areas, and holds property interests in easements, pipelines, and pump stations, which have been acquired or constructed to provide such service. The revenues generated from supplying such areas comprise an important part of the revenues necessary to finance the continued operation and improvements to the Board's system.

The Tenth Circuit's holding in *Sequoyah County Rural Water District v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), represents a threat to the Board and other municipal water systems throughout the nation because that court construed 7 U.S.C. § 1926(b) to authorize a taking of vested property rights without just compensation, in violation of the Fifth

Amendment. These property rights include investments in infrastructure and capital improvements, and the right to serve customers in areas where water service has been extended.

The Board believes its brief can assist the Court because it raises a relevant issue not previously raised by the parties. As more fully explained in the proposed brief, a "cardinal" principle of statutory construction adopted by this Court provides that courts should construe statutes so as to avoid constitutional problems, unless such construction is contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bld. & Constr. Trades Council,* 485 U.S. 568, 574 (1988). The Tenth Circuit's holding completely disregards this long-standing principle, resulting in an unconstitutional construction of § 1926(b).

Thus, for the preceding reasons, the Board has an interest in this action, and requests the Court to grant it leave to file its *amicus curiae* brief, attached hereto.

Respectfully submitted,

MARY H. THOMPSON
Counsel of Record
K. MARK PARNELL
GORHAM & WALDREP, P.C.
Attorneys for Amicus Curiae
2101 6th Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

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STATEMENT OF INTEREST

Amicus curiae, The Water Works and Sewer Board of the City of Birmingham (herein referred to as the "Board"), originally chartered as the Birmingham Water Company in 1885, is an Alabama public corporation which provides water to the Birmingham metropolitan area and many outlying areas.[1] The Board also operates, on behalf of the City, a water distribution system consisting of pipelines, pump stations, water tanks and other facilities. Over its years of operation, as the Board has extended its service area to outlying rural areas, it has made capital improvements to its water distribution system in order to supply customers in such areas. The Board has also acquired real property interests in the nature of easements and right-of-ways to supply such areas. The revenues generated from supplying customers in these rural areas comprise an important part of the revenues needed to finance the continued operation and improvements to the Board's water system. The Tenth Circuit's holding in this matter extends the protection from competition for rural water associations receiving federal loans under 7 U.S.C. § 1926(b). According to the Tenth Circuit, once a rural water association obtains a federal loan under this Section, the protection under § 1926(b) attaches to prohibit a municipal supplier from continuing to serve its own customers within the rural water association's service area, regardless of the fact that the municipality began service prior to the extension of the loan. Such an interpretation of § 1926(b) effects a "taking" and represents a threat to the Board's property rights

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1. Counsel for a party in this case has not authored any part of this brief, and other than *amicus curiae*, its members and its counsel, no other person or entity has made a monetary contribution to the preparation or submission of this brief.

and interests in rural areas, along with its ability to continue its operation and improvements to its water system. Thus, the Board has an interest in this matter.

SUMMARY OF THE ARGUMENT

The Tenth Circuit failed to apply a "cardinal" principle of statutory construction adopted by this Court which provides where the construction of a statute raises "serious constitutional problems," courts must inquire whether there is another interpretation which will not raise such problems. *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490 (1979). The Tenth Circuit's construction of 7 U.S.C. § 1926(b) allows a rural water association, which receives a federal loan pursuant to the statute, to prevent a municipal water supplier from continuing to serve pre-existing customers within the rural water authority's service area, even though such customers were connected to the municipality's system *prior* to the date of the loan. Not only is this holding clearly contrary to the holdings of the majority of Circuits that have construed § 1926(b), but it also conflicts with the Fifth Amendment's prohibition on the taking of property without payment of just compensation.

The Tenth Circuit's construction of § 1926(b) would authorize a "taking" either through a municipality's loss of use of its infrastructure within the affected area, including water lines and other facilities, or through the imposition of a "constructive trust" over such pipelines and facilities for the benefit of the rural water authority's customers. *Sequoyah,* 191 F.3d at 1194, 1206. It is clear that Congress only intended for the protection from competition under § 1926(b) to apply to the substitution of water suppliers

during the term of the loan, not the initiation of water services prior to such loan nor the continuation of services after the loan is extended. Because there is no indication of legislative intent for § 1926(b) to authorize a taking, this Court should grant the Petition to construe § 1926(b) to avoid any Fifth Amendment problems.

ARGUMENT

The Tenth Circuit held that the Respondent, Sequoyah County Rural Water District No. 7 (herein referred to as "Sequoyah"), was entitled to seek relief pursuant to 7 U.S.C. § 1926(b) for the Petitioners', Town of Muldrow and Muldrow Public Works Authority (herein collectively referred to as "Muldrow") initiation of water service to customers in rural areas within Sequoyah's service area, which service continued beyond the date that Sequoyah received a federal loan under 7 U.S.C. § 1926(b), despite the fact that Sequoyah did not have such loan at the time Muldrow began servicing these areas. *Sequoyah,* 191 F.3d at 1206. This holding is contrary to this Court's long established principle that where the construction of a statute would raise serious constitutional problems, the court should construe the statute to avoid such problems unless such construction is clearly contrary to the intent of Congress. The Tenth Circuit's construction of § 1926(b) would allow a taking of Muldrow's property without payment of just compensation in violation of the Fifth Amendment of the Constitution of the United States.

In *Richmond Screws Anchor Company v. United States,* 275 U.S. 331, 346 (1928), this Court held that "[i]t is our duty in the interpretation of federal statutes to reach a

conclusion which will avoid serious doubt of their constitutionality." Similarly, in *United States v. Security Industrial Bank,* 459 U.S. 70, 82 (1982), this Court declined to construe section 522(f)(2) of the Bankruptcy Reform Act of 1978 so as to "call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the 'takings clause.'" In *Edward J. DeBartolo Corporation v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, (1988), the National Labor Relations Board interpreted section 8(b)(4) of the National Labor Relations Act in a manner which violated the First Amendment. This Court noted that the above rule of statutory construction "has for so long been applied by this Court that it is beyond debate" and held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.,* 485 U.S. at 574 (citing *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490, 500 (1979); *Crowell v. Benson,* 285 U.S. 22, 62 (1932); *Murray v. The Charming Betsy,* 2 L. Ed. 208 (1804)). This Court further stated,

> [t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

DeBartolo Corp., 485 U.S. 568 (citing *Hooper v. California*, 155 U.S. 648, 657 (1895); *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884)).

The Fifth Amendment provides in part "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. This Court has held that the Fifth Amendment protects the property of states from appropriation by the federal government. *United States v. Carmack*, 329 U.S. 230, 242 (1946), *reh'g denied*, 329 U.S. 834 (1947). A statute regulating property uses effects a taking if it causes the owner to incur a "physical invasion of his property" or if it causes the owner to lose all "economically viable" uses of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

In this action, Sequoyah sought declaratory and injunctive relief, as well as damages for Muldrow's water sales, which it alleged, violated § 1926(b). *Sequoyah*, 191 F.3d at 1194. Sequoyah also requested a constructive trust for its use and benefit, over all of Muldrow's water lines and facilities used to serve residents within Sequoyah's service area. *Id. See Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, Petitioner App. B, p. 34a, n.2. The Tenth Circuit declined to address the constructive trust issue but instructed the District Court on remand to determine the appropriate remedy. *Sequoyah*, 191 F.3d at 1194, n.3. In holding that Sequoyah may seek recovery for water services initiated by Muldrow during a time period when Sequoyah did not have a federal loan, but which continued after Sequoyah received a federal loan, the Tenth Circuit has construed § 1926(b) to allow an unconstitutional taking of

Muldrow's property, either by the "physical invasion" of imposition of a constructive trust over its pipes and other facilities or by prohibiting the continued sale of water to Muldrow's customers, thereby causing Muldrow to lose the "economically viable" use of its pipes and facilities.

The Consolidated Farm and Rural Development Act authorizes the Secretary of Agriculture to make loans to nonprofit water service associations to promote water use and development to assist farmers and other rural residents. 7 U.S.C. § 1926(a). Section 1926(b) provides,

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). The Fourth Circuit has held that the purpose of § 1926(b) is to protect federal loans under the Rural Development Insurance Fund. *Bell Arthur Water Corp. v. Greenville Utilities Comm'n,* 173 F.3d 517, 523 (4th Cir. 1999). The court explained that such purpose is obvious based upon the language of the statute, which only provides protection from competition "during the term of such loan."

Bell Arthur, 173 F.3d at 523. Similarly, the Sixth Circuit has also held that the intent of this Section is to protect the federal lender's interest during the term of the loan. *Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 42 (6th Cir. 1996). The Seventh Circuit has interpreted § 1926(b) to prohibit another water supplier "from being substituted for, and from displacing, the service of the rural water association." *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 135-36 (7th Cir. 1993) (citing S. Rep. No. 566 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309).

Because Congress intended § 1926(b) to provide protection from competition only during the term of the federal loan, it is clear that where no such loan exists, municipal or private water services may begin servicing customers in rural areas. Likewise, because the statutory protection only applies where a municipal water supplier displaces a rural water association from serving an area, Congress clearly did not intend for § 1926(b) to divest a prior water supplier of vested property rights merely by the subsequent funding of a federal loan. Thus, there is not a clear indication that Congress intended for § 1926(b) to authorize a taking of property rights. Since § 1926(b) can be reasonably construed to avoid constitutional questions of its validity under the Fifth Amendment, such construction should be ascribed to this Section.

CONCLUSION

For the foregoing reasons, this *Amicus* urges the Court to grant Muldrow's Petition for Writ of Certiorari. In so doing, the Court can determine whether there is another reasonable interpretation of 7 U.S.C. § 1926(b), which does not raise serious Fifth Amendment concerns, that can be resorted to in order to save such Section from unconstitutionality.

Respectfully submitted,

MARY H. THOMPSON
Counsel of Record
K. MARK PARNELL
GORHAM & WALDREP, P.C.
Attorneys for Amicus Curiae
2101 6th Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216